The Troxel Company *and* Furniture Workers Division, Local 282, International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL–CIO. Cases 26–CA–12325, 26–CA–12396, 26–CA–12535, 26–CA–12562, 26–CA–12577, 26–CA–12567, 26–CA–12621, 26–CA–12746, 26–CA–12827, 26–CA–12831, 26–CA–12950, 26–CA–12954, 26–CA–13027, 26–CA–13098, and 26–CA–13198–1

January 23, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 24, 1990, Administrative Law Judge Hubert Lott issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Leerell Shields for reporting to work under the influence of intoxicants on February 10, 1989. The General Counsel argues that Shields was discharged, and not given a lesser form of discipline, because of his union activity. The Respondent asserts, however, and the judge found, that the other employees who had been disciplined, but not discharged, for reporting to work under the influence of intoxicants had not actually clocked in and begun work. With this distinction in mind, the judge found that the Respondent met its *Wright Line*[3] burden, that Shields would have been discharged even absent his union activity. We disagree and find that the General Counsel made out a prima facie case and that the Respondent has not provided sufficient justification for the disparity to meet its burden under *Wright Line*.

The operative facts concerning Shields' discharge are essentially undisputed. On September 29, 1987, the Union filed a petition to represent the Respondent's production and maintenance employees at its Moscow, Tennessee facility at which the Respondent manufactures bicycle seats, playpens, metal tubing, and other consumer products. Shields actively supported the Union during the campaign for the first election on November 19, 1987, and the rerun election held May 10, 1988.[4]

On February 10, 1989, Shields reported to work at the start of his 3:25 to 11:55 p.m. shift, punched his timecard, and began to work. At approximately 4:45 p.m., while the other employees in his department gathered to receive the department's housekeeping award, Shields approached his supervisor, Clinton Pye, to request additional supplies.[5] Thereafter, at approximately 5 p.m., Pye summoned Shields to the personnel office for a meeting with Pye, David Moore, the Respondent's personnel director, Betty Denham, the night-shift superintendent, Wilson Rhea, and another supervisor, Mike Johnson. Shields requested a witness and, after attempts to contact his cousin, Ivy Terry,[6] failed, the Respondent summoned Shields' sister, Gloria Shields, to the meeting.

At the meeting Shields was accused of reporting to work under the influence of intoxicants. Shields admitted to having had ''some beers'' at lunchtime but denied that he was under the influence[7] and refused to undergo a sobriety test. Shields also admitted that he knew the Respondent's policy against reporting to work under the influence of intoxicants.[8] Shields complained, however, that other employees who had reported to work while under the influence had not been disciplined, and that he was being singled out because of his union activity.[9] Shields was suspended pending an investigation and notified of his discharge on February 15, 1989.

We find that the General Counsel met its burden under *Wright Line*, supra, by presenting a prima facie violation of Section 8(a)(3) and (1) concerning the dis-

[1] The General Counsel has not excepted to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) when it promised an employee a promotion in exchange for a ''No'' vote in the November election or by granting pay increases to discourage union activity. Nor has the General Counsel excepted to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(3) and (1) by discriminating against Ivy Terry, ceasing to pay production pay for relief work to Terry and Charles Allen, or refusing to hire Tyrone Henderson.

[2] We shall modify the judge's recommended Order to require that the Respondent remove from the personnel records of Altener Shields, Thelma Loftis, Linnie Henderson, Mary Franklin, and Linda Mason, all references to their unlawful suspensions. The record discloses that, contrary to the judge's finding, the Respondent did not remove all references to the suspensions from their personnel files. Rather, the Respondent's personnel director, Betty Denham, testified that she marked the suspensions ''void'' but that they remained in the employees' files.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] On March 23, 1988, the Board denied the Respondent's request for review of the Regional Director's decision sustaining the Union's objection to the November election and ordering a new election.

[5] At that time he also spoke with the Respondent's vice president for human relations, David Moore, who asked Shields if he was going to attend the opening of the ballots challenged during the May 10, 1988 election.

[6] Terry also was active on the Union's in-plant organizing committee as were Shields' sister and several other members of his family who worked for the Respondent.

[7] Shields testified that he had purchased two beers that morning, which he consumed while working on his car at approximately noon.

[8] Under the Respondent's policy, it is a dischargeable offense to report to work under the influence of alcohol.

[9] The record discloses no prior discipline of Shields for this or any other serious violations of the Respondent's policies.

charge of Shields. The evidence discloses that Shields, a union supporter, was active on the in-plant organizing committee, distributed handbills at the plant entrance, wore union paraphernalia, and testified, at the Union's request, at a Board hearing on ballots challenged during the rerun election on May 10, 1988. The Respondent admitted it knew of Shields' union activity and, indeed, on the very day of the suspension that led to his discharge, the Respondent's vice president for human relations asked Shields whether he would attend the opening of the challenged ballots. In addition, the Respondent's animus toward the union activity of its employees has been firmly established by the many violations of the Act to which the Respondent admitted.[10] Finally, the evidence disclosed that Shields was treated more harshly than others who committed similar violations of the Respondent's policy against reporting to work under the influence of intoxicants. Indeed, the Respondent presented no evidence that any employee, prior to Shields, had been discharged for reporting to work under the influence of intoxicants.

The General Counsel presented evidence that employee, Calvin Sullivan, had been suspended on October 19, 1978, sent home on May 23, 1986, and reprimanded on October 3, 1988, for reporting to work on each of these dates under the influence of alcohol or with the odor of alcohol on his breath. In February 1989, near the time of Shields' discharge, the Respondent referred Sullivan to a rehabilitation center for the treatment of alcohol consumption. Similarly, on December 13, 1985, employee Jerome Grandberry was sent home and reprimanded by his supervisor after he was discovered to be under the influence of alcohol, and on March 21, 1987, employee Freddie Williamson was ordered to clock out and go home after his supervisor discovered that he had reported to work under the influence of alcohol.

Notwithstanding this evidence of disparate treatment of Shields, the judge found that the Respondent would have discharged Shields even absent his union activities. The judge distinguished the evidence concerning Sullivan and Grandberry stating that, unlike Shields, they had not clocked in and started work. (The judge did not attempt to distinguish Williamson's situation from Shields'.) The judge further found that, although the Respondent admitted to inconsistencies in the drinking policies under the prior personnel director (who left the Respondent's employ in November 1987), the ''evidence disclosed no disparate treatment when a supervisor discovers an employee working under the influence of alcohol or drugs.'' He accordingly dismissed the 8(a)(3) allegation based on Shields' discharge.

We disagree with the judge's attempted distinction of the Sullivan and Grandberry situations from that of Shields. Although on the latest occasion in October 1988, Sullivan apparently had not clocked in and begun to work, the record discloses that, on at least one prior occasion, he had begun to work.[11] Furthermore, Grandberry's supervisor testified that he, too, had clocked in prior to being sent home. Although the Respondent makes much of the fact that Shields refused to take a sobriety test when one was offered to him on February 10, 1989, the record discloses that the Respondent had not similarly offered Sullivan and Grandberry a sobriety test, nor had it notified employees that their refusal to take such a test would trigger a discharge, as opposed to some lesser form of discipline, for the violation.

Contrary to the judge, therefore, we find that the Respondent's rationale for the disparate treatment of Shields, as compared with Sullivan, Grandberry, and Williamson, fails to rebut the General Counsel's prima facie case or establish that the Respondent would have discharged Shields even absent his union activity. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by discharging Shields.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 4.

''4. Respondent violated Section 8(a)(1) and (3) of the Act by suspending Altener Shields, Thelma Loftis, Linnie Henderson, Mary Franklin, Linda Mason, and Janey Harris, and by discharging Leerell Shields.''

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent discriminatorily suspended certain employees and made restitution in backpay for the suspensions. Therefore, it is only necessary to verify that this has been done in accordance with Board law.[12] However, the Respondent must remove from these employees' records any reference to their having been discriminatorily suspended and notify them in writing that this has been done and that evidence of that unlawful action will not be used as a basis for any future actions against them.

Having further found that the Respondent discriminatorily discharged Leerell Shields it must offer him immediate and full reinstatement to his

[10] These include the disparate enforcement of its no-solicitation rule and timecard policies, interrogations, surveillance, solicitation of grievances and promises of benefits, threats of reprisal and plant closure, and expressions of the futility of unionism.

[11] The record discloses that on May 23, 1986, Sullivan reported to work at 6 a.m., clocked in, began to work, and was sent home at 6:15 a.m.

[12] In the event interest was not included, interest on the respective amounts of backpay paid shall be required. Such interest shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 298 (1950), with interest as computed in *New Horizons for the Retarded*, supra. Likewise, the Respondent must remove from Shield's records any reference to his discharge and notify him in writing that this has been done and that evidence of that unlawful action will not be used as a basis for any future personnel actions against him.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Troxel Company, Moscow, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(p).

''(p) Discharging or otherwise discriminating against any employee for supporting Furniture Workers Division, Local 282, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO or any other labor organization.''

2. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

''(a) Offer Leerell Shields immediate and full reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy of this decision.

''(b) Remove from its files any reference to its discriminatory discharge of Leerell Shields, and the discriminatory suspensions of Altener Shields, Thelma Loftis, Linnie Henderson, Mary Franklin, Janey Harris, and Linda Mason, and notify them in writing that this has been done and that the discharge and suspensions, respectively, will not be used against them in any way.

3. Insert the following as paragraph 2(e).

''(e) Notify the Regional Director for Region 26 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees regarding union activities and sympathies.

WE WILL NOT impliedly promise employees improved benefits if employees withhold their support for the Union.

WE WILL NOT solicit employee complaints and grievances and promise unspecified improvements in terms and conditions of employment if employees reject the Union.

WE WILL NOT threaten employees with unspecified reprisals.

WE WILL NOT inform employees of the futility of selecting a union.

WE WILL NOT promise employees improved wages and benefits if they reject the Union.

WE WILL NOT threaten to withhold benefits if our employees select a union.

WE WILL NOT threaten plant closure if our employees selected a union.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT threaten an employee with discharge if he displays a union emblem.

WE WILL NOT maintain and enforce a solicitation and distribution rule in a disparate manner.

WE WILL NOT maintain and enforce a timecard rule in a disparate manner.

WE WILL NOT grant benefits to employees to discourage their support of the Union.

WE WILL NOT distribute literature which impliedly promises benefits and threatens reprisals to discourage union support.

WE WILL NOT suspend employees engaged in union activities.

WE WILL NOT discharge or otherwise discipline any employee for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Leerell Shields immediate and full reinstatement to his former job or, if that job no longer

exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Leerell Shields that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL, if necessary, make Altener Shields, Thelma Loftis, Linnie Henderson, Mary Franklin, Janey Harris, and Linda Mason whole, with interest, for any losses they may have suffered as a result of their unlawful suspensions.

WE WILL notify Altener Shields, Thelma Loftis, Linnie Henderson, Mary Franklin, Janey Harris, and Linda Mason that we have removed from our files any reference to their suspensions and that the suspensions will not be used against them in any way.

THE TROXEL COMPANY

William D. Levy, Esq., for the General Counsel.
Jeff Weintraub and *Richard Bennett, Esqs. (Weintraub, Robinson, Weintraub & Stock)*, of Memphis, Tennessee, for the Respondent.
Willie Rudd and *Ida Leachman*, of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. The consolidated cases were heard in Memphis, Tennessee, on March 20–23, May 8–11, and July 10 and 11, 1989. Unfair labor practice charges were filed by the Furniture Workers (Union) against the Troxel Company (Respondent) from September 1987 to May 17, 1989. Complaints, consolidated complaints, and amended complaints issued from December 23, 1987, to July 5, 1989.

The complaints allege multiple independent 8(a)(1) violations and 8(a)(3) and (5) violations with one 8(a)(1) and (4) violation.

The parties were afforded an opportunity to be heard, to call, to examine, and to cross-examine the witnesses and to introduce relevant evidence. Since the close of hearing, briefs have been received from the parties.

On the entire record and based on my observation of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Troxel Company is a corporation with an office and place of business in Moscow, Tennessee, where it is engaged in the manufacture of bicycle seats, playpens, metal tubing, and other consumer products. Annually, in the course and conduct of its business operations, Respondent sells and ships from its Moscow, Tennessee facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Tennessee.

The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

On September 29, 1987, the Union filed a petition for election (Case 26–RC–6988) seeking to represent approximately 600 production and maintenance employees at Respondent's Moscow, Tennessee plant. The initial Board-conducted election was held on November 19, 1987. The Union failed to receive a majority of votes cast and, subsequently, filed objections. A rerun election was conducted on May 10, 1988. Challenges to the ballots of certain employees were determinative of the outcome and Respondent filed timely objections. In June 1988, a hearing was held on the objections and challenges. On August 3, 1988, the hearing officer issued a report overruling the objections and sustaining the four challenged ballots. Respondent filed exceptions to the hearing officer's conclusions. On August 28, 1988 the Regional Director adopted the findings and recommendations of the hearing officer and certified the Union. On September 14, 1988, Respondent filed with the Board a timely request for review of the Regional Director's decision and on March 30, 1989, the Board issued an order granting Respondent's request. On June 16, 1989, the Board issued its Decision on Review and Order wherein it found, contrary to the Regional Director, that three challenged ballots should be opened and counted. This was done on June 20, 1989, and a revised tally of ballots showed that the Union did not obtain majority status.

Since all the 8(a)(5) allegations were predicated on the Union's certification in August 1988, counsel for General Counsel on July 5, 1989, and again on July 10, 1989, filed a motion with me to delete or withdraw all 8(a)(5) allegations in the complaints. The motion is granted.

B. *The 8(a)(1) Complaint Allegations Admitted by the Respondent*

1. Respondent, on or about the dates set forth below, acting through Clinton Pye (Respondent's supervisor), at Respondent facility:

(a) On or about October 12, 1987, interrogated an employee regarding the employee's union membership, activities, and sympathies and impliedly promised the employee improved benefits if the employee withheld support for the Union.

(b) On or about October 15, 1987, interrogated its employees regarding their union membership, activities, and sympathies.

(c) On or about October 15, 1987, solicited employee complaints and grievances and promised its employees unspecified improvements in their terms and conditions of employment if the employees rejected the Union as their bargaining representative.

2. On or about October 16, 1987, Respondent, acting through Victor John (Respondent's supervisor), at Respondent's facility:

(a) Threatened its employees with unspecified reprisals.

(b) Promised its employees that benefits would increase and terms and conditions of employment would improve if the employees rejected the Union as their bargaining representative.

3. On or about October 21, 1987, Respondent, acting through Victor John (Respondent's supervisor), at Respondent's facility, informed its employees that it would be futile for them to select the Union as their bargaining representative.

4. Respondent, on or about the dates set forth below, through Michael Terry (Respondent's president), at Respondent's facility:

(a) In or about the first week of November 1987, during meetings with employees, impliedly promised employees improved wages if they withheld their support of the Union.

(b) On numerous occasions during the period from November 4, 1987, to November 17, 1987, during meetings with employees, solicited its employees' complaints and grievances and impliedly promised to rectify the complaints and grievances.

(c) On or about November 12, 1987, announced to employees that it was granting employees improved seniority standing in order to induce the employees to withhold their support of the Union.

(d) On or about November 17, 1987, during meetings with employees, told employees that they would lose holiday benefits and other benefits if its employees selected the Union as their bargaining representative.

(e) On or about November 16, 1987, during a meeting with employees, promised employees improved wages if they withheld their support of the Union.

(f) On or about November 17, 1987, during meetings with employees, told employees they would lose holiday benefits and suffer a reduction in wages if its employees selected the Union as their bargaining representative.

(g) On several occasions from November 4, 1987, to November 17, 1987, during meetings with employees, threatened employees with plant closure if they selected the Union as their bargaining representative.

5. Respondent, on or about the dates set forth below, through James Russell (Respondent's personnel director), at Respondent's facility:

(a) In or about the first week of November 1987, threatened employees with reduced wages if they selected the Union as their bargaining representative.

(b) On or about November 12, 1987, threatened employees with a reduction in holiday benefits if they selected the Union as their bargaining representative.

(c) On or about November 16, 1987, threatened employees with reduced wages if they selected the Union as their bargaining representative.

(d) On or about November, 17, 1987, threatened employees with reduced wages if they selected the Union as their bargaining representative.

(e) On or about November 17, 1987, threatened employees with reduced holiday benefits if they selected the Union as their bargaining representative.

(f) In September 1987, the exact date being unknown, interrogated an employee regarding the employee's union membership, activities, and sympathies.

(g) In September 1987, the exact date being unknown, solicited an employee's grievances and complaints and impliedly promised to rectify the grievances and complaints.

6. Respondent, through Robert Harrison (Respondent's board chairman and CEO), at Respondent's facility, on or about November 16, 1987, promised an employee unspecified benefits if the employee withheld the employee's support of the Union.

7. On or about November 16, 1987, Respondent, through Leon Redfern (Respondent's supervisor), at Respondent's facility, expressed to an employee the futility of unionism by telling the employee that Respondent would offer no benefits in negotiations.

8. On or about November 17, 1987, Respondent, through Minnie Adams (Respondent's supervisor), at Respondent's facility, promised an employee a raise if the employee withheld the employee's support of the Union.

9. Respondent, on or about the dates set forth below, through Jerry Moore (Respondent's supervisor), at Respondent's facility:

(a) On or about November 16, 198?, interrogated an employee regarding the employee's union membership, activities, and sympathies and created the impression that Respondent maintained surveillance of the union activities of its employees.

(b) On or about November 17, 1987, interrogated an employee regarding the employee's union membership, activities, and sympathies and created the impression that Respondent maintained surveillance of the union activities of its employees.

10. On or about November 20, 1987, Respondent, acting through Sam Hand, at Respondent's facility, created an impression among its employees that it was maintaining surveillance of its employees' union activities.

11. On or about February 22, 1988, Respondent, acting through Jerry Waldrop, at Respondent's facility, threatened an employee with loss of employment if the employee continued to display a union emblem.

12. On or about the dates set forth below, Respondent, acting through James Russell, at Respondent's facility:

(a) On or about April 10, 1988, threatened its employees that the Respondent would leave if the Union came in.

(b) On or about April 15, 1988, created an impression among its employees that their union activities were under surveillance by Respondent.

(c) On or about April 15, 1988, threatened its employees with unspecified reprisals and blacklisting because of their union support.

13. At all times material herein, Respondent has maintained the following rule:

> Solicitation and Distribution of materials:
>
> Solicitation by an employee, of another employee is prohibited while either person is on working time. Working time is all times when an employee's duties require that he or she be engaged in work tasks, but does not include an employee' own time, such as meal periods, scheduled breaks, time before or after a shift, and personal clean up time. Distribution of advertising material, handbills, or other literature in work areas of this facility is prohibited at any time. Solicitation, distribution of literature or trespassing by non-employees is prohibited on these premises.

(a) In or about early February 1988, the exact date being unknown, Respondent, acting through Jim Russell, maintained and enforced the rule described above selectively and disparately by prohibiting union-related solicitations and distributions while permitting non-union-related solicitations and distributions.

(b) In or about February 1988, the exact date being unknown, Respondent, acting through Donald Culver, maintained and enforced the rule described above selectively and disparately by prohibiting-union-related solicitations and distributions.

(c) On or about April 11, 1988, Respondent, acting through Eddie Lee Cavett, maintained and enforced the rule described above selectively and disparately by prohibiting union-related solicitations and distributions.

14. Since on or about April 5, 1988, Respondent has maintained the following rule:

> Intentionally punching the timecard of another employee or permitting someone else to clock your card, soliciting, or causing other employees to punch timecards other than their own, is considered a serious rules infraction and may be cause for dismissal.

15. On or about April 5, 1988, by posting a notice to employees, Respondent promulgated the rule described above in a discriminatory manner.

16. On or about May 10, 1988, Respondent, acting through David Smith, at Respondent's facility, in separate conversations with individual employees, threatened its employees with plant closure and/or loss of jobs if the Union were selected as the employees' bargaining representative.

17. On or about May 23, 1988, at Respondent's facility, Respondent made and unscheduled grant of benefits to employees by implementing a monthly prayer service and providing free coffee and doughnuts at such service.

18. During or about August 1988, the exact date being unknown, Respondent, acting through Michael Terry at Respondent's facility:

(a) Solicited employee grievances thereby discouraging employees' support of the Union.

(b) Impliedly promised preferential treatment to employees who do not support the Union.

(c) Threatened employees with job loss because of their union support and activities.

19. Respondent, on or about the dates set forth below, acting through Claude Hunsucker, at Respondent's facility:

(a) On or about August 15, 1988, threatened an employee with unspecified reprisals because of the employee's union support and activities.

(b) On or about September 12, 1988, interfered with, restrained and coerced an employee in the exercise of the employee's Section 7 rights because of the employee's union support and activities.

(c) On or about September 13, 1988, threatened an employee with unspecified reprisals for engaging in protected activity.

C. *The 8(a)(1) Allegations in Dispute*

1. Respondent's literature distributed from November 10–13, 1987

In support of this allegation, General Counsel offered into evidence Respondent's literature distributed before the first election. In the first employer notice dated November 10, 1987, General Counsel asserts that the following questions and answers are unlawful.

> Q. If the furniture workers call a strike, will I get paid?
>
> A. No.
>
> Q. If Local 282 calls a strike, can I lose my job?
>
> A. Yes. Under the *law* the company can continue operating and hire new employees.

The employer notice dated November 12, 1987, contains the following language:

> I firmly believe that the union actually threatens your job because of its past record of strikes and plant closing. I also believe that a Union, any union, can destroy the confidence of our customers in our ability to produce and deliver on time.
>
> Our customers are very worried about deliveries. They can switch from one supplier to another when they feel that they cannot count on timely deliveries. Our customers, and particularly Fisher-Price, now know that we can deliver on time. With a union comes the possibility of a strike. Fisher Price could never be sure of deliveries again.
>
> There are a number of union-free companies that are dying to take our Fisher-Price business from us. Higher Price could move these jobs to its Murray, Kentucky plant, 250 miles away. *I do not believe we could survive the loss of either the high chair or the car seat. Fisher Price can take this business away from us at any time.* This could be the end for us. Can we afford to gamble? Can you take the RISK—simply on the strength of union promises?
>
> The Union can't guarantee job security. Hundreds of thousands of employees of union plants all across the country are on layoffs or have lost their jobs because their plant closed. Real job security results from all of us working together as a team to produce quality products that will be delivered on time. If we don't get it to the customer, or the job is not done right, we don't

have customers, and without the customers, there is no job security.

Please VOTE ''NO'' for REAL job Security!

The employer campaign literature circulated on November 13, 1987, contained in part the following language:

> The Union has carefully stated that an employee can't be ''fired'' during a strike. Certainly, an employee can strike legally and not be fired for it. What the Union doesn't tell you is that a company can continue to operate during a strike and *hire permanent replacements* for the strikers. The Company can keep the replacements when the strike ends and does not have to take the strikers back. Strikers lose their jobs just like they were fired.

General Counsel cites the following language in another employer notice dated November 13, 1987:

> ''We hope you don't think that a vote for the union will automatically increase wages or benefits. *Nothing can be further from the truth.*
>
> In negotiations the Company takes into consideration all its costs and expenses to determine whether or not it can give any increases in wages or benefits. When a union comes in, the Company must add to its normal costs, the lost time and cost of handling grievances and arbitrations, the daily hassle with the union and its shop stewards, loss of productivity, and the costs of a potential strike. *The law allows the Company to start over. We can start bargaining from ZERO. If we lose the election, we are not required by law to give you what we planned to do if we had won.*
>
> These things are REAL when we sit down at the bargaining table. This is what sometimes makes negotiations so difficult. It is one of the reasons why many employees have suffered reductions and freezes in pay and benefits in union plants in the last few years. This is known as ''roll back'' and ''concession bargaining'' which you have seen on television and on the front pages and newspapers.

The employer notice dated November 14, 1987, contains the following language:

> Have you wondered why the Furniture Workers' union Local 282 is so touchy about their violent strikes and plant closings? I think I know because we have studied their history of unsuccessful negotiations, strikes and plant closings which have thrown thousands of employees out of work.
>
> Here is the record of plants represented by this union that *WE KNOW ABOUT* that have closed or have moved in the last few years following strikes, violence and irresponsible harassing tactics:
>
> | | |
> |---|---|
> | Memphis Furniture Co. | Closed |
> | Abolian Co. | Closed |
> | Memphis Dinettes | Closed |
> | Framed Picture Enterprise | Moved to Mississippi |
> | United Uniforms | Closed |
> | Harte-Hanks | Closed |
> | Trojan Luggage Co. | Cut from 700 to 65 employees |
>
> The union is telling you that these plants closed or moved away because of financial problems—THIS IS A HALF-TRUTH! They're not telling you the *OTHER* half-the *cause* of these financial problems, namely, long and unsuccessful negotiations, strikes, violence and other tactics such as pressuring companies like Sears to pull their business away. Do you think that all of these companies closed down because of ''poor management?''

Analysis and Conclusions

General Counsel asserts that the language in the November 10 and 13 notices that Respondent ''does not have to take the strikers back'' and that ''strikers lose their jobs just like they were fired,'' constitute unlawful threats. He further asserts that since Respondent offered no proof that Fisher-Price intended to withdraw its business from Respondent in the event of unionization, the statement set forth in Respondent's notice dated November 12, 1987, are not protected by Section 8(c) and constitute a violation of Section 8(a)(1) of the Act.

Finally, General Counsel asserts that the threats to reduce wages and benefits as a result of expending funds to wage a campaign against the Union which is stated in the November 13, 1987 notice is coercive because there was nothing offered by the Employer to demonstrate that that its contentions are true.

Respondent's counsel asserts that the leaflets merely set forth Respondent's legal position should the Union call a strike. Referring to permanent replacements does not amount to an unlawful threat of discharge. He further asserts that the leaflets do not expressly state that the Employer will withhold benefits if the employees select a union. There is nothing unlawful about the Employer setting forth its bargaining position and explaining the economic realities that attend thereto. Finally, Respondent's counsel contends that lighting other plant closing is not unlawful because there was no prediction that the Employer would close if the employees chose a union.

When viewed in isolation the Employer's leaflets are probably protected by Section 8(c) of the Act. However, all of these leaflets were distributed during a time when the Employer engaged in massive admitted 8(a)(1) activity. Specifically the Employer threatened to close the plant if the employees voted for the Union. It threatened to take away benefits and reduce wages and informed employees of the futility of selecting a union. All of these violations and others bear directly on the language in the leaflets and when viewed in the total surrounding context, renders the language cited by General Counsel violative of Section 8(a)(1) of the Act.

Accordingly, I find that the specific language cited by General Counsel from the Employer's leaflets distributed from November 10–14, 1987, violates Section 8(a)(1) of the Act.

2. Whether Respondent accelerated and implemented insurance benefits in violation of Section 8(a)(1) of the Act

General Counsel offered three witnesses who testified in support of this allegation. Shirley Cannon testified that before the first election in 1987 President Michael Terry spoke to all the employees in the conference room. He told the employees that he could not talk about raising wages because of the Union, but he could talk about insurance because he had been working on that before the Union filed a petition. According to Cannon, Terry said he had surveyed a number of plants in the area and the insurance he had planned to give the employees was better than what they had. Mary Henderson testified that at one of these meetings in November 1987 Terry told the employees that he was going to lower insurance costs and increase insurance benefits regardless of whether the Union wins the election. Jerry Rogers testified that in November 1987 Terry spoke to employees and told them that he was raising their hospitalization.

It was stipulated by the parties that on January 1, 1988, Respondent implemented a new insurance plan including increased sick leave pay and decreased weekly employee contributions.

Michael Terry testified that the Company's health insurance policies ran from January 31 to December 31. When he first became president of the Company in July 1986, he was aware that the Company's insurance program was obsolete since it had not been changed in 18 years. In early 1987, the Company hired the consulting firm of Johnson and Higgins to begin a review of its insurance program and propose a new insurance package. In mid-1987 he ordered personnel to survey other companies in the area to see what kind of benefits they provided. On August 21, 1987, Johnson and Higgins proposed that new insurance contracts be effective January 1, 1988. Terry further testified that numerous conversations where held between himself and Johnson and Higgins before he decided in late 1987 to implement the new insurance plan when the old policy expired. We stated that 90 percent of the policy was complete in June 1987; however, he was still waiting for other coverage bids to come in which prolonged the decision to implement.

According to Personnel Director James Russell, during employee meetings, prior to the union election, many employees voiced their complaints about the Employer's insurance program. Terry brought the papers from his office and explained to them that he had been working on the insurance program since 1986 and would implement it as soon as possible. Terry then said it would be effective around the first of the year.

Analysis and Conclusions

A review of the evidence indicates there is no credible evidence that Respondent promised to accelerate the improved insurance benefits. Nor is there any credible evidence that improved insurance benefits were conditioned upon the outcome of the election.

With respect to the implementation of the insurance benefits on January 1, 1988, it is noted that the first election was over and the second election was not held until May 10, 1988. Furthermore, the uncontradicted evidence reveals that Respondent embarked upon this effort long before the advent of the Union and continued on an unbroken course of action that culminated in ultimate implementation. In short, the evidence indicates that the implementation would have taken place at the scheduled time notwithstanding the Union.

Accordingly, I find that General Counsel did not establish with a preponderance of the evidence that Respondent violated the Act and I will, therefore, dismiss these allegations.

3. Whether President Michael Terry promised employee Greg Long a promotion for a ''No'' vote in the election

Wilma Perkins testified for General Counsel that at a company-sponsored meeting, in the fall of 1987, Greg Long asked Michael Terry if he could have a certain job in the plant if he voted ''no'' in the election. Michael Terry is alleged to have said, ''Yes, contact me later.''

Jerry Rogers testified that at the same meeting that Greg Long asked Terry for a job and Terry responded to by asking him whether he would vote for the Union if he got the job, Long said no, he would not vote for the Union if he got the job.

Michael Terry denies that either he or Long made such statements.

Analysis and Conclusions

Greg Long did not testify, therefore General Counsel is left with contradictory hearsay testimony which I will not credit or consider. Accordingly, I will dismiss this allegation.

4. Whether James Russell, on November 19, 1987, solicited an employee to organize a grievance committee, promised to form a grievance committee if employees voted against the Union and on April 10, 1988, informed employees that they would not receive benefits because of their union activities

Loretta McClure testified for General Counsel that in January 1988 James Russell spoke to her in his office about the Company's retirement plan. We had a copy of the plan and pointed out that if the employees were members of a bargaining unit, they would not be eligible to participate in the retirement plan. The retirement plan which is dated April 30, 1980, excludes employees covered under a collective-bargaining agreement.

McClure also testified that in October 1987 she went to Russell's office to complain about the amount of time and money wasted in the plant. When she finished what she had to say, Russell told her the Company needed more people like her to tell them what was going on because they could not always be out in the plant. Russell said he had thought about starting a grievance committee of people like McClure who were concerned with the Company and the way it was run. McClure finally testified that she supported the Company up until 2 weeks before the May 10, 1988 election. Her boyfriend, Bobby Rhea, was terminated from the Company 2 weeks before she switched allegiance to the Union.

James Russell testified that he told employees he could have nothing to do with setting up a grievance committee.

Analysis and Conclusions

I find no basis for a threat of reprisal in Respondent's retirement plan or the remarks of Russell which are one and the same. The plan was implemented long before the advent

of the Union and indicated that a separate retirement plan would have to be negotiated with the Union for bargaining unit employees.

In reference to the grievance committee, I find no evidence that Russell promised to establish a grievance committee, much less, do it if the employees rejected the Union. Accordingly, I am dismissing these allegations.

5. Whether Respondent, on May 9, 1988, in a notice to its employees, promised to create a grievance procedure if its employees voted against the Union

General Counsel witnesses testified that immediately prior to the second election on May 10, 1988, the following notice appeared on bulletin boards:

EMPLOYEES
NOTICE

PROPOSAL
GRIEVANCE COMMITTEE

Purpose—To bear grievances from fellow employees to be final decision maker in cases heard

Objective—To give voice to employees in everyday working environment

Organization—Committee of seven people elected by secret ballot from representatives of each department and elected by that department

Committee re-elected annually

Respectfully submitted by concerned Troxel employees May 9, 1988.

The notice appeared on Respondent's stationery and was similar to other Respondent notices and it was posted on all Respondent's unlocked bulletin boards. Katey Linsey testified she saw the notice before the May 10, 1988 election but did not know whether she saw it after the election.

General Counsel offered into evidence a company rule prohibiting the posting of material on bulletin boards unless specifically authorized by the director of personnel.

The Respondent's personnel director at that time was James Russell who testified that the notice in question was not a company notice and he did not know where it came from. After he was informed about the notice being on bulletin boards, Russell ordered it removed.

Analysis and Conclusion

The evidence does not support the contention that Respondent posted the above notice, rather it supports the contention that ''concerned Troxel employees'' posted the notice on May 9, 1988. The credited evidence also supports Respondent's assertion that it did not condone the notice since it was ordered removed upon discovery. It is not uncommon during hotly contested election campaigns to have all kinds of unauthorized election material and campaign propaganda distributed or posted throughout the plant. Tracking down employees who do these things is a wasteful and futile effort.

Accordingly, I am dismissing this allegation.

6. Whether Respondent, in a memorandum dated May 10, 1988, promised unspecified benefits if its employees rejected the Union

General Counsel relies solely on a memorandum issued on May 10, 1988, by Jim Russell and Michael Terry. He does not point specifically to anything unlawful.

The memorandum states in part that with profits everyone will benefit under Russell and Terry. It further states, ''Send this Union away and let us put in place our program for benefitting everyone without our bands being tied by the Government on making money and benefit changes.''

Analysis and Conclusion

I view the above language as permissible free speech. When read in context, I view the Employer's statement as a commitment to continue improving which is not a violation of the Act. Accordingly, I am dismissing this allegation.

D. *The 8(a)(1) and (3) Allegations*

1. Alleged discrimination against Ivy Terry

Ivy Terry testified that he has been employed at Respondent's Moscow plant since 1968. About a month before the first election in November 1987, Terry wore a union hat, a union T-shirt, and union buttons to work. He engaged in union handbilling and served as a member of the Union's in-plant organizing committee. In October 1987, Terry was a forklift operator and asked his supervisor, James Vaughn, if he could get the mill relief C job. Vaughn said he would have to take a paycut if he took the new job. Terry declined the job. In the latter part of October, Board Chairman Robert Harrison spoke to employees. He told them that lots of things were going on that he didn't know about and that he had just found out that Terry had applied for a job but did not accept it because of a paycut. He said he was going to look into that problem and iron it out. Sometime during the first 2 weeks of November, Terry was taken to the personnel office where he met with James Russell and General Foreman Jerry Culver. Culver apologized to Terry for the mistake and offered him the new relief job with no pay cut. Terry said he would think about it and a week later accepted the job which provided an increase of 44 cents per hour. Nothing was mentioned about the Union in their conversation.

On February 17, 1989, Supervisor Michael Johnson called Terry into his office and, in front of Supervisors Jerry Culver and Raymond Bryant, told Terry that he had complaints from other employees that Terry was inquiring about Leerell Shields' suspension. Johnson asked Terry if had done this and Terry said yes. Johnson told Terry that it was against company policy to do this and said the incident would go into his file.

Betty Denham, personnel director since January 1989, testified that after she read the ''report of discussion'' with Terry filed by Johnson the next day, she explained to Johnson that she thought there was a misunderstanding concerning the rule against soliciting employees while either person is on working time. Shortly, thereafter Denham called Terry into her office and explained that he was permitted to talk to other employees as long as it was not on work time. She also told Terry that she was removing the ''report of discus-

sion'' from his file. The ''report of discussion,'' which was neither a verbal nor written warning, was removed from Terry's file that day.

Analysis and Conclusions

I can find no evidence of a promise of promotion if Terry withheld his support for the Union. Furthermore, I find insufficient evidence that Terry was promoted to induce him not to support the Union. Apparently, a mistake was made and corrected by Respondent which led to Terry's upgrade, notwithstanding his union activities.

I find that General Counsel did not prove that, in fact, a written warning was issued to Ivy Terry. Respondent's evidence, which I credit, revealed that Terry was questioning employees at their work stations about the discharge of Leerell Shields. Michael Johnson counseled Terry about bothering employees while at work and placed a report of this discussion in his personnel file. The evidence established that, at most, Terry's filed contained a ''report of discussion'' for 1 day. Reports of discussion do not amount to discipline. Moreover, Denham took immediate remedial action by informing Terry of the correct company policy and that she had removed the nondisciplinary report.

Accordingly, I am disclosing all the above allegations relating to Ivy Terry.

2. Whether Respondent ceased paying production pay to Ivy Terry and Charles Allen for performing relief work because they supported the Union

Charles Allen has been relief man on first shift for 8 years. He distributed union handbills at the plant prior to both elections. He wore union buttons, cap, and T-shirt to work before both elections. As a relief man, he was supposed to either help out, relieve, or be assigned to the yoder mill machine. In the past when his supervisor had him perform one of these functions, Allen testified that he was paid production pay instead of the hourly relief, rate (production rate is usually higher then hourly rate). According to Allen and Terry, the Respondent stopped paying them production pay in April 1989 for about 1 week. Allen claims he lost about $20.

Ivy Terry claims he was taken off production rate after he testified at this hearing on March 23, 1989.

General Foreman Jerry Culver testified that there are three different functions a mill relief operator performs:

> Relief, when he relieves an operator for lunch, breaks or when the operator has to be temporarily away from his machine.
>
> Helping out, when during a slack period the relief man helps out on the mill until needed for relief.
>
> Assignment, when the relief operator is assigned to a mill machine for the duration of the day or the duration of a job.

Culver testified that for the past 25 years he has been at Troxel, mill relief operators are not paid production rate when they are relieving or helping out. But they do receive production rate on assignments. On those occasions the mill relief operators name is put on the mill report.

Supervisor Raymond Bryant testified that on one occasion Terry's name was placed on a mill report when he was only helping out. After that Bryant told Terry that he should not put his name on the mill report when he was relieving a mill operator.

Respondent's records indicate that from April 1–26, 1989, Terry received production pay seven times and for the same period Allen received production pay three times.

Analysis and Conclusions

The evidence does not reveal that Terry and Allen where treated any differently from any of the other operators. The unrefuted evidence is that Respondent does not apply the production rate to relief or helping out work, but only to assignment work. The evidence also reveals that there was some confusion in communicating this company policy to Terry and Allen which was compounded when Respondent inadvertently paid Terry for relief work. However, I find that there is insufficient evidence to establish a discriminatory application of production pay on the part of Respondent. Therefore I conclude that Respondent has carried its *Wright Line* burden.

Accordingly, I will dismiss these 8(a)(3) and (4) allegations.

3. Whether Respondent more stringently enforced its timecard punching rule and suspended employees in order to discourage them from supporting the Union

On or about April 5, 1988, Respondent maintained the following rule:

> Intentionally punching the time card of another employee or permitting someone else to clock your card, soliciting, causing other employees to punch timecards other than their own, is considered a serious rules infraction and may be cause for dismissal.

On April 4, 1988, Respondent suspended Altener Shields, Thelma Loftis, Linnie Henderson, and Mary Franklin for 10 days and Linda Mason, on April 15, 1988, for 2 weeks for violating the above rule. Respondent's counsel admitted that Respondent had prior knowledge of their union activities. Respondent's counsel also admitted that stricter and inconsistent enforcement of the rule was applied to these individuals because supervisors namely, John Crisp, had prior knowledge that employees clocked other employees in or out at the beginning or at the end of a shift.

Betty Denham testified that 1 year after the suspensions, when she was preparing for this trial, she discovered that supervisors where allowing employees to punch each other's timecards. As a result of this discovery, Respondent paid the above employees backpay for the time they were suspended and expunged the discipline from their personnel files.

Analysis and Conclusions

Respondent asserts that since the Employer's more stringent enforcement of timecard rules was for a legitimate business reason and since they made the employees whole for the disparate treatment accorded them, Respondent did not violate the Act.

I disagree with Respondent's assertion because of the timing of the suspensions, the length of time it took to remedy

the situation, and the fact that no repudiation of its action was published and no assurances were given that Respondent would not interfere with employees' Section 7 rights.

Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended the above employees and failed to take proper corrective action.

4. Whether Respondent granted pay increases to discourage union activity

General Counsel presented one witness, Edward Steele, employed at Troxel, who testified that at a company meeting with employees about November 1, 1987, James Russell told the employees the Company could give no raises. Steele asked about his 90-day raise which was then 1-1/2 overdue. Russell said he would check into the matter and get back to Steele in 2 days. Two days later, Steele received his raise.

Respondent presented evidence through Betty Denham that before 1987 the Company had a policy of granting progression increases according to a wage schedule until the employee reached the job rate. Shortly after Denham became personnel assistant, in December 1986, it was discovered that as many as 100 employees were late in receiving their progression increase. She and Russell immediately began approving raises so that over the next 3 months, they believed everyone had caught up.

Respondent's records indicate that Steele was reclassified on May 18, 1987, and sometime after November 9, 1987, he received a progression raise.

Analysis and Conclusions

The Respondent's policy of granting progression increases was in effect long before the advent of the Union. Respondent's policy of catching up or paying overdue progression increases also predated the Union. Respondent's uncontradicted evidence indicates that it dealt with the Steele raise just as though no union was in the picture. Significantly, this was the only allegation of unlawful pay increase out of a unit of 600 employees.

Accordingly, I will dismiss this allegation.

5. Whether Respondent on March 28, 1988, promulgated a new disciplinary procedure to discourage employee support for the Union

The evidence presented came from Respondent's witnesses, James Russell and Betty Denham. Russell became personnel director in November 1987. The testimony revealed that Respondent had an employee handbook in effect with a code of conduct listing 19 offenses which required immediate dismissal without prior warning, unless management found extenuating circumstances and 13 offenses which required either verbal or written warning; however, repeated offenses would raise these to a major violation. On November 28, 1988, Russell issued ''Guidelines for Disciplinary Procedures'' to supervision wherein discipline was established for first offenses through fifth offenses. For example, 15 offenses required discharge for a first violation, while committing traffic violations and smoking or eating while operating machinery or working mandated discharge on the fifth offense. The guideline was never intended to replace the handbook or code of conduct but to promote consistency and fairness in discipline. Prior to the issuance of the ''Guideline,'' the degree of discipline was discretionary with the supervisor for many offenses. The code of conduct was used as a basis for a ''guideline'' and nothing in the ''guideline'' could be used to neutralize the code of conduct, e.g., a dischargeable offense was still a dischargeable offense. Russell testified that after issuing the ''guideline'' to supervision, he reviewed discharges and suspensions and found them to be consistent with the guidelines.

Analysis and Conclusions

General Counsel asserts that by issuance of the ''guideline'' an inference may be drawn that Respondent violated the Act when it is done during an organizational campaign and Respondent fails to show, by objective evidence, that changes were motivated by considerations other than union activity. I find that Respondent has satisfied that requirement. The code of conduct does not address progressive discipline whatsoever. Furthermore, the code leaves much of the discipline to the discretion of supervisor. The guideline attempts to correct these problems in an evenhanded way.

It is noteworthy that General Counsel did not offer any evidence that the guideline was used to discriminate against any employee. Nor was any evidence offered that any employee ever saw the guidelines. Therefor, it is difficult to see how promulgation of the guideline which was merely a refinement of the code of conduct, discouraged employees from joining, supporting, or assisting the Union.

Accordingly, I will dismiss this allegation.

6. Whether Respondent promulgated and implemented a more restrictive disciplinary policy to discourage employees from supporting the Union

The evidence reveals that the employee handbook code of conduct which was issued prior to the union campaign called for verbal and written warnings for attendance violations and that repeated infractions would be considered a major violation.

Russell testified that for the past 2 years he noticed an increase in absenteeism especially on the second and third shifts causing the Company to shut down one line or department to supply employees to operate another line or department. Supervisors were complaining that they could not maintain production with such a high absentee rate. Betty Denham testified that attendance had become such a problem that production lines had to be shut down. She also stated that the existing policy was unfair to employees who reported to work because they would lose incentive pay due to the absence of others since employees were paid group incentive rates. Russell stated that the existing absentee policy was not policy at all because in practice it left discipline up to the supervisors who applied it inconsistently based on whether the particular supervisor liked or disliked the employee. Russell further testified that although he had been working on a new attendance policy since early 1987 he was in no position to implement such a policy until after November 1987 when he became personnel director. According to Russell and Denham, the new attendance policy was implemented and distributed to all employees on January 11, 1988, in order to improve attendance, production, and to eliminate favoritism. The new attendance policy called for one-half point being assessed for tardiness and one point being as-

sessed for more than 4 hours' absence. An employee could accumulate 10 points in a given year with no disciplinary action. After that, the following discipline would be assessed: 11 points verbal warning, 12 points written warning, 13 points 3 days' suspension, 14 points 10 days' suspension, 15 points discharge. Monetary awards were given for good attendance.

General Counsel offered the testimony of four employees who engaged in union activity at the Respondent's plant and were disciplined under the new policy. Arthur Hobson was given a verbal warning on November 30, 1988, and a written warning on December 13, 1988. Roosevelt Humphrey was suspended on August 5, 1988. Betty Lewis was issued a verbal warning on September 12, 1988, although she had a doctor's excuse which should have exempted her from receiving any points. Linell Settles testified he was absent from work on January 29, May 18, and June 6, 1988, and submitted doctor's statements to the Company each time.

Betty Lewis testified that she received a verbal warning after receiving 11-1/2 points. However, Betty Denham testified that this verbal warning was rescinded after a mistake was discovered when preparing documents for trial, giving her only 10-1/2 points. Roosevelt Humphrey admitted that he had enough points under the new policy to warrant a 3-day suspension. Arthur Hobson testified that he had received a verbal warning, not a written warning and that he had 8 or more points.

Linell Settles testified he only missed 1 day in 1988 that was not covered by a doctor's excuse. The balance of the absence time, according to Settles, was covered by doctor's statements. The 1 day he was absent with no excuse was in early December 1988.

Respondent offered documentary evidence that 47 employees were disciplined under Respondent's new policy and none of those employees were on the in-plant organizing committee which totaled 30 employees. However, Denham identified 14 employees on a list of employees disciplined that she noticed wearing union insignia sometime during the union campaign.

Analysis and Conclusions

General Counsel offered no evidence that Respondent promulgated its absentee policy in order to discourage membership in a labor organization. On the other hand, Respondent offered uncontradicted evidence that it implemented its absenteeism policy for legitimate business reasons.

In applying the policy, General Counsel offered the testimony of four out of nine employees alleged to have been discriminated against. Of the four employees, three admitted that the discipline was justified. Furthermore, all the documentary evidence supports Respondent's contention that all employees were treated uniformally regardless of their union activity. Since no other evidence was offered by General Counsel with respect to any other employees, I must agree with Respondent.

The only employee who may have been unfairly treated was Linell Settles. Settles testimony was confusing and conflicting; however, he did offer doctor's excuses into evidence to cover his absences which according to Respondent's new policy would exempt him from accruing points. He further testified that he only missed one unexcused day in early December 1988. This was not refuted by Respondent's counsel. A close examination of Settles' record indicates that he received verbal and written warnings and a 3-day suspension on March 28, 1988, none of which were alleged to be violations. Therefore the presumption is that he had accumulated 13 points and should have received the discipline. Settles also stated that he had an unexcused absence in early December which would have given him 14 points requiring a 10-day suspension in December—not a discharge. Respondent argues in brief that Settle's absence record shows 27-1/2 points at time of discharge; however, my records and the records of the reporting service indicate that Settle's absentee record was withdrawn from evidence and never resubmitted.

Linell Settles stated that his union activity consisted of wearing union T-shirt and buttons to work before the first election. Later, he testified that he did not wear T-shirts and buttons until after his 3-day suspension on March 28, 1988. His union activity was at best minimal and would not have stood out as anything exceptional because it could not be distinguished from that of hundreds of other employees. Therefore, I conclude that General Counsel did not prove with a preponderance of evidence that Settles' union activity was the cause of his discharge. Accordingly, I will dismiss these 8(a)(1) and (3) allegations.

7. Suspension of Janey Harris

Respondent admits suspending Harris for 1 day on April 4, 1988, for distributing a union leaflet to an employee during her break. Respondent further admits that in this case it applied its no-distribution, no-solicitation rule in a disparate manner. In preparation for this trial, Respondent learned that other employees had been known to solicit during working time and that no disciplinary action had been taken. Therefore Respondent paid Harris for the day she was suspended and removed the suspension from her personnel file.

Analysis and Conclusion

I disagree with Respondent's assertion that it did not violate the Act because it remedied the violation for reasons stated above in paragraph 3. Namely: timing of the suspension, length of time it took to correct the violation, no published repudiation, and no assurances were given to employees that Respondent would not interfere with their Section 7 rights.

Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended Janey Harris and failed to take proper corrective action.

8. Refusal to hire Tyrone Henderson

Tyrone Henderson filed an application for employment with Respondent on February 16, 1988. Respondent had an established practice of employing relatives of employees. In addition to Henderson's mother, Robertha Henderson, who had worked 21 years for Respondent, Respondent also employed Henderson's three sisters, Christine, Mary, and Deliane. These employees wore union T-shirts and other union insignia to work prior to the November 1987 election. Mary and Deliane Henderson distributed union literature prior to the November 1987 election.

Robertha Henderson testified that in March 1988 she asked Personnel Director Russell to hire her son. According to Robertha, Russell told her the Company had not hired her

son because the daughters were participating in the Union and costing the Company money.

Russell testified that he had a conversation with Robertha Henderson wherein she asked him to hire her son Tyrone. Russell told her to see Assistant Personnel Director Betty Denham because he did no hiring and received no employment applications. Russell also testified that prior to the hearing, he had never seen Tyrone Henderson or his application, nor did he know when the application was submitted. Russell stated that he had no conversation with Denham about Tyrone and only after charges were filed did he ask Denham to check to see if Tyrone had filed an application.

Betty Denham testified that the selection process begins when a written requisition is received from a supervisor in the department with an opening. She explained that she does not interview anyone when they file an application. When openings occur, she looks through the stack of applications for someone with relevant experience or persons with industrial backgrounds and as a last resort persons with no experience. Denham stated that she would go through the applications in whatever order they were in, calling every qualified applicant she came to until enough applicants were hired to fill the openings. Ten to twenty employees a day asked Denham to hire their relatives or friends. In response to their request Denham asks that the relative or friend file an application and that she would tab it for easy identification. And if there is an opening, the friend or relative will be considered. Denham was unaware that Tyrone Henderson had filed an application until after charges were filed and an investigation was conducted. She did not know why he was not hired and she did not consciously pass over him. At the time Tyrone's application was on file, there were 271 other applications on file waiting to be processed. According to Denham, she did not screen out applicants if they had relatives who were union supporters. In fact, she hired the brother of Loretta McClure, a known union supporter, and numerous relatives of union supporters.

Analysis and Conclusions

There is insufficient evidence that Respondent refused to hire Tyrone Henderson because of the union activities of his relatives. But for the uncorroborated statement attributed to Russell by Robertha Henderson, there is no evidence that Respondent discriminatorily refused to hire Tyrone. I will his credit Robertha's testimony because it is biased and unsupported by all the evidence. Noteworthy is the lack of evidence that Robertha ever asked Betty Denham to hire Tyrone when Denham was the only person who could have satisfied her request.

Accordingly, I will dismiss this allegation.

9. Suspension and discharge of Leerell Shields

Shields began his employment with Respondent on June 20, 1984. At the time of his discharge on February 10, 1989, his job consisted of using a hand-operated bander. He worked from 3:25 to 11:55 p.m. Respondent admits to knowledge of Shields' union activity. On February 10, 1989, the employees in Shields' department gathered to celebrate the receipt of a housekeeping award. Shields refused to join the other employees but did approach the area to speak to his supervisor, Clinton Pye. While there, Vice President of Human Relations David Moore asked Shields about his wife who had just had a baby. Moore also asked his if he was going to attend the meeting in Memphis to open the challenged ballots. Around 4:30 or 5 p.m. Pye asked Shields to join the gathering but Shields refused. At the time Pye smelled alcohol on Shields and noticed that his speech was slurred. Pye reported this to his supervisor, Wilson Ray, who in turn reported it to Betty Denham telling her that they should deal with the situation now because Shields might get hurt. (Shields operates a bander having two 6-inch blades and no safety guard). Shields was taken to the personnel office by Pye. Present were Moore, Ray, and Denham. During the course of this meeting Denham asked Shields if he had been drinking. First Shields said he had one beer. Then he said he had two beers and later said he had some beers. Shields was asked if he knew the rule about working while intoxicated and he said he did. Denham offered, as part of standard procedure, to give Shields a sobriety test but Shields refused. Shields mentioned that employee Calvin Sullivan had been under the influence while at work and not been disciplined. Denham said she would suspend Shields pending an investigation. The investigation revealed that in September 1988 Sullivan never started work while intoxicated but reported to the guard that he was unable to work. After this investigation Shields was informed that he was discharged.

Analysis and Conclusions

The evidence supports a finding that Respondent has satisfied its *Wright Line* burden that it would have discharged Shields notwithstanding his union activities. General Counsel offered evidence that Jerome Grandberry had reported to work while intoxicated and not been discharged. However Grandberry, like Sullivan, had not clocked in and started work.

Respondent admits there were inconsistencies in the drinking policies several years ago when Barney Raines was personnel director. However, evidence disclosed no disparate treatment when a supervisor discovers an employee working under the influence of alcohol or drugs. Accordingly, I will dismiss this allegation.

10. Reprimand and suspension of Ralph Schrimsher

Ralph Schrimsher served as a union observer at both NLRB elections. He also distributed prounion literature in the parking lot. On February 23, 1988, Schrimsher's supervisor, Larry Eskew, told him he regarded himself as a union executive.

On March 7, 1989, Schrimsher was suspended for 10 days in accordance with company handbook rules and disciplinary guidelines against spreading false and malicious gossip.

James Russell was told by Guard Supervisor Gus Loftis that Ralph Schrimsher told Loftis that Jessie Milligan was suspended for engaging in an altercation with Mary Harris over the collection of empty aluminum cans. Since Milligan was prounion and Harris was not, it would cost the Company votes in the next election. Russell called a meeting with Schrimsher, Supervisor Larry Eskey, Loftis, Milligan, and Harris. Loftis repeated the allegation in front of Schrimsher who admitted making the statement. It was further discovered that there was no truth in the story. During the meeting, employee Ricky Pierce was called in and asked about the

rumor. He said Schrimsher had told him the same story which Schrimsher did not deny.

After ascertaining that Mary Harris took a voluntary layoff and that the Company had a past practice of disciplining employees for spreading false and malicious gossip, Russell suspended Schrimsher.

On March 29, 1989, Supervisor Larry Eskew issued a verbal warning to Ralph Schrimsher for negligently operating his machine.

Larry Eskew testified that Schrimsher had operated his machine with a stay-clamp lodged in it thus causing a broken die. Eskew accused Schrimsher of operating the machine when he should have known something was wrong because of his long experience as a machine operator. Eskew also accused Schrimsher of not informing him that the die was broken.

Schrimsher testified that while the die on his machine was broken, this was a common occurrence. Apparently no one had ever been disciplined for breaking a die.

Analysis and Conclusions

The evidence supports a finding that Respondent met its *Wright Line* burden on the 10-day suspension. Respondent conducted a fair investigation and discovered that Schrimsher had told a story about the Company and other employees which was untrue. Schrimsher admitted relating the story to others when he did not know whether it was true or not. Respondent applied the discipline called for in its guidelines. General Counsel argues that others also spread this rumor and there was no showing that Schrimsher's statements interrupted production, caused any strife among employees or was detrimental to Respondent's business. I can find no evidence as to who the ''others'' were. The evidence pointed the finger at Schrimsher. I am further of the opinion that during a union organizational campaign as hotly fought as this one, that rumors such as this would have a damaging effect on employee morale. In fact, this rumor appears to have found its way into a union leaflet disparaging the Company for its disparate treatment of employees.

In reference to the verbal warning, I conclude that again Respondent satisfied its *Wright Line* burden by proving that Schrimsher's negligence contributed to the broken die. He was verbally warned in accordance with the Company's disciplinary guideline. Significantly, 2 days after the warning incident, Schrimsher's machine broke another die; however, he was not disciplined for this occurrence because Schrimsher's supervisors determined that there was nothing Schrimcher could have done to prevent it from happening or even known about the pulled slugs. Furthermore, the evidence indicates that broken dies are not commonplace and are expensive to repair. However, broken punches are a frequent occurrence and are easily repaired at little cost. I credit Supervisor Larry Eskew's testimony over Schrimsher on this contradiction.

Accordingly, I conclude that no violations were committed and I will dismiss these allegations.

Conclusions of Law

1. Respondent Troxel Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Furniture Workers Division, Local 282, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees regarding union activities and sympathies.

(b) Impliedly promising employees improved benefits if employees withheld their support for the Union.

(c) Soliciting employee complaints and grievances and providing unspecified improvements in terms and conditions of employment if employees rejected the Union.

(d) Threatening employees with unspecified reprisals.

(e) Informing employees of the futility of selecting a union.

(f) Promising employees improved wages and benefits if they rejected the Union.

(g) Threatening to withhold benefits if its employees selected a union.

(h) Threatening plant closure if employees selected a union.

(i) Creating the impression, among employees that their union activities are under surveillance.

(j) Threatening an employee with discharge if he continued to display a union emblem.

(k) Maintaining and enforcing a solicitation and distribution rule in a disparate manner.

(l) Maintaining and enforcing a timeclock rule in a disparate manner.

(m) Granting benefits to employees to discourage their support of the Union.

(n) Distributing literature which impliedly promised benefits and threatened reprisals to discourage union support.

4. Respondent violated Section 8(a)(1) and (3) of the Act by suspending Altener Shields, Thelma Loftis, Lenny Henderson, Mary Franklin, Linda Mason, and Jani Harris.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. All other allegations not mentioned above are not found to be violations of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent discriminatorily suspended certain employees and made restitution in backpay for the suspensions and expunged the suspensions from their files. Therefore it is only necessary to verify that these things have in fact been done in accordance with Board law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, the Troxel Company, Moscow, Tennessee, its officers, agents, successors, and assigns, shall

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Interrogating employees rewarding union activities and sympathies.

(b) Impliedly promising employees improved benefits if employees withheld their support for the Union.

(c) Soliciting employee complaints and grievances and promising unspecified improvements in terms and conditions of employment if employees rejected the Union.

(d) Threatening employees with unspecified reprisals.

(e) Informing employees of the futility of selecting a union.

(f) Promising employees improved wages and benefits if they rejected the Union.

(g) Threatening to withhold benefits if its employees selected a union.

(h) Threatening plant closure if employees selected a union.

(i) Creating the impression among employees that their union activities are under surveillance.

(j) Threatening an employee with discharge if he continued to display a union emblem.

(k) Maintaining and enforcing a solicitation and distribution rule in a disparate manner.

(l) Maintaining and enforcing a timeclock rule in a disparate manner.

(m) Granting benefits to employees to discourage their support of the union.

(n) Distributing literature which impliedly promised benefits and threatened reprisals to discourage union support.

(o) Suspending employees in a disparate and discriminatory manner for violating the timecard and distribution rules.

(p) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(b) Post at its facility in Moscow, Tennessee, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''